IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1651

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN S. MARTIN, JR.
MARTIN, OBERMAIER & MORVILLO
1290 Avenue of Americas
New York, New York 10019
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND RULES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William L. Matheson, Executor of the Will of Dorothy Gould Burns, Deceased, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 3, 1976.

Opinions Below

The opinion of the Court of Appeals (App. A p. 1a) is not yet reported. The opinion of the District Court (App. B p. 25a) is reported at 400 F. Supp. 1241.

Jurisdiction

The opinion and judgment of the Court of Appeals were entered on March 3, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the court below was correct in holding that this Court's decision in *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), overruled the earlier holding of *Savorgnan* v. *United States*, 338 U.S. 491 (1950), that a United States citizen who applies for naturalization in a foreign country automatically loses American citizenship?

2. Whether the estate of a citizen, who automatically lost United States citizenship by applying for foreign nationality but continued to believe she was a citizen and to pay United States taxes, is barred by the doctrines of estoppel or laches from asserting that the decedent had lost United States citizenship when she obtained foreign nationality?

Statute Involved

Section 401 of the Nationality Act of 1940 (54 Stat. 1168-69) provides:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained

> the age of twenty-three years without acquiring permanent residence in the United States: *Provided further,* That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> (d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or
>
> (f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United

States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction.

Statement

Dorothy Gould Burns was born in the United States of American parents in 1904. In 1919, she moved to join her parents in Europe, and she never again established a residence in this country.

On May 24, 1944, in Mexico, she married Archibald Burns, who had been born in Mexico of Scottish parents and was, therefore, a Mexican national.

After her marriage to Burns, she contacted a Mexican attorney, Francisco Liquori, and told him "she wanted to obtain her Mexican nationality . . . she intended to reside in Mexico". On December 21, 1944, Mrs. Burns signed an application for Mexican citizenship prepared by Mr. Liquori which stated in part:

> "I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin."

On January 2, 1945, a certificate of Mexican nationality was issued to Mrs. Burns by the Mexican Ministry of Foreign Relations. Thereafter, Mrs. Burns' name was removed from the list of aliens maintained by the Ministry of Interior, and she was issued a Mexican passport. In 1946 Mrs. Burns, who had one daughter from her marriage to Mr. Burns, made application for her oldest daughter, Rolande de Graffenried, to immigrate to Mexico as the daughter of a Mexican national. Mrs. Burns continued to reside in Mexico until 1953, when she travelled to the south of France, where she resided until her death on July 5, 1969.

After World War II had ended, Mrs. Burns travelled to the United States and Europe. After finding the treatment accorded to her while travelling on a Mexican passport to be unsatisfactory and believing she would receive better treatment if she travelled on an American passport, she made application to the American Consulate in Mexico City for a United States passport on May 2, 1947. The passport application form contained in fine print the statement that among other things, she never obtained naturalization in a foreign state or had taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state.* A United States passport was issued to her on May 21, 1947. This 1947 passport was extended in 1949 and again in 1951.

As a result of an application which she made on May 6, 1952, for a further extension of her United States passport, the Department of State undertook, *sua sponte,* an investigation of Mrs. Burns' Mexican citizenship. The Passport Office was aware that Mrs. Burns had been issued a certificate of Mexican nationality, and that it was the stated policy of the Mexican Ministry of Foreign Relations, since

---

* A similar printed statement was contained on all of the subsequent passport applications filed by Mrs. Burns.

at least 1942, not to issue a certificate of Mexican nationality unless an applicant, such as Mrs. Burns, took an oath of allegiance and made a renunciation of foreign nationality. Ultimately the Passport Office determined Mrs. Burns was entitled to a passport, and it was continuously reissued or extended from time to time until her death in 1969.*

From 1956 on, Mrs. Burns filed United States income and gift tax returns as if she were a citizen of the United States. In this connection she paid approximately $63,000 more in income taxes and $127,000 more in gift taxes than she would have been required to pay as a nonresident alien.

Mrs. Burns died on July 5, 1969. The following February her Executor learned for the *first* time that Mrs. Burns had signed the application for a certificate of Mexican nationality in which she had pledged allegiance to the Republic of Mexico and renounced all citizenship foreign thereto. On or about April 14, 1970, the Executor filed claims for refund for United States income taxes and gift taxes for the years 1966 through 1968, the only years for which the statute of limitations had not then run. In addition, he filed on or about that date a final income tax return for 1969 on the basis that Mrs. Burns was a nonresident alien and he claimed a refund of overpayment of estimated tax. The refunds for 1966 and 1969 income taxes were promptly made without audit. Thereafter, an office audit was conducted in connection with the claims for refund of gift taxes for the years 1966 through 1968, and these claims were disallowed.

---

* The determination of the Passport Office that Mrs. Burns was entitled to a passport was made pursuant to 22 U.S.C. § 212 which provides:

> "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

On or before October 5, 1970, the defendant filed a nonresident alien estate tax return with respect to Mrs. Burns' estate. Between that date and October 5, 1973, an audit was conducted and several issues were raised, including the citizenship of Mrs. Burns at the time of her death. As a result, a notice of deficiency was issued to the estate and, on December 10, 1973, the Executor filed his petition in the Tax Court contesting the assessment of the deficiency and moved to stay all proceedings with respect thereto.

In May of 1973 the Government brought this action to recover the 1966 refund which it alleges was erroneously made. On June 5, 1974, the Executor commenced a civil action in the district court to recover the overpayments of gift taxes for 1966, 1967 and 1968.

The district court granted summary judgment to the Government in both actions, holding that under *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), Mrs. Burns' application for Mexican nationality did not automatically expatriate her, and she did not lose her citizenship at the time because she did not have a subjective intent to renounce United States citizenship. The district court alternatively held that, if Mrs. Burns did have a subjective intent to renounce her United States citizenship, her estate was barred by the doctrines of estoppel and laches from asserting she had lost her citizenship at that time because thereafter she represented to the Passport Office that she was a United States citizen. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

POINT I

The holding of the Court below that a citizen who applies for naturalization in a foreign country is not automatically expatriated should be reviewed by this Court.

The basic question presented below was whether Dorothy Gould Burns lost her American citizenship in late 1944 and early 1945 when she sought and obtained Mexican citizenship. It was the position of petitioner that Mrs. Burns automatically lost her American citizenship in accordance with the express terms of two separate provisions of the Nationality Act of 1940, which provides in relevant part:

> "A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person; • • • or
>
> (b) Taking an oath or making an affirmation or other formal declaraion of allegiance to a foreign state; • • •." 54 Stat. 1168-1169

The Court of Appeals concluded that under this Court's opinion in *Afroyim* v. *Rusk,* 387 U.S. 253 (1967), these provisions of the Nationality Act could not constitutionally be applied to Mrs. Burns because when she applied for Mexican nationality, she did not have a subjective intent to renounce her United States citizenship. Since *Afroyim* has already been limited by this Court in *Rogers* v. *Bellei,* 401 U.S. 815 (1971), the Court should grant certiorari here in order to resolve the question of the continuing

validity of *Afroyim.* Even if the Court is not prepared to overrule *Afroyim* and return to the teaching of *Perez* v. *Brownell,* 356 U.S. 44 (1958), it would be appropriate for the Court to grant certiorari here to make clear that *Afroyim,* which involved a provision of the Nationality Act that made loss of citizenship the automatic consequence of voting in a foreign election, should not be extended to the different provisions of the Act at issue here.

In *Savorgnan* v. *United States,* 338 U.S. 491, 499-500 (1950), this Court expressly rejected the argument that for expatriation to occur the citizen who applies for foreign nationality must have a subjective intent to renounce American citizenship:

> "[T]he acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.
>
> • • •
>
> "There is nothing . . . that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the legal consequences of such an act." (Footnotes omitted.) *Accord, Revedin* v. *Acheson,* 194 F. 2d 482 (2d Cir. 1952).

When this Court subsequently decided *Afroyim,* it did not indicate an intention to overrule *Savorgnan.* Although *Afroyim* did expressly overrule the earlier decision of this Court in *Perez* v. *Brownell,* both of those cases involved the constitutionality of Section 401(e) of the Na-

tionality Act of 1940 which provided that a citizen of this country could lose his citizenship by voting in a foreign election. In *Perez* the Court held that Congress, pursuant to its powers to regulate the relations of the United States with foreign countries, could make loss of citizenship an automatic consequence of such action. The majority in *Afroyim* held, however, that citizenship was a right guaranteed by the Fourteenth Amendment and Congress did not have the power under the Constitution to strip a person of his citizenship. The Court in *Afroyim* summarized its holding as follows:

> "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." 387 U.S. at 268.

Even if *Afroyim* was not overruled *sub silentio* in *Rogers* v. *Bellei, supra,* there is little reason to extend the ruling in *Afroyim* to invalidate the different provisions of the Nationality Act of 1940 which are involved here. The basis for loss of citizenship at issue in *Afroyim* and *Perez,* voting in a foreign election, was a ground for loss of nationality unique to the laws of the United States, the invocation of which would often have the undesirable effect of rendering the former citizen stateless. See 387 U.S. at 268; MacDougal, Lasswell and Chen, *The Protection of the Individual in External Areas,* 83 Yale L.J. 900, 937 (1974). The provisions of the 1940 Act at issue here, which makes loss of citizenship the result of obtaining foreign citizenship and declaring allegiance to a foreign government, are, however, bases for loss of nationality generally invoked by nations to prevent problems of dual nationality where a person has voluntarily taken on a new allegiance to a foreign government. See Duvall, *Expatriation under United States Law, Perez and Afroyim: The Search for a Philosophy of American Citizenship,* 56 Va.L.Rev. 408, 410 (1970).

The majority opinion in *Afroyim* expressly recognized that American citizenship could be lost if the citizen "voluntarily relinquishes that citizenship." 387 U.S. at 268. While the majority in *Afroyim* did not attempt to enumerate those acts which would constitute a voluntary relinquishment of citizenship, the majority did cite with approval the dissent of Chief Justice Warren in *Perez* which stated:

> "It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country. While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship. Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status. In recognizing the consequence of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship." 356 U.S. at 68-69 (Footnotes omitted).

In acquiring Mexican citizenship, Mrs. Burns performed an act which, as Chief Justice Warren noted, is a generally recognized manifestation of a renunciation of any other

citizenship. The deposition testimony of Francisco Liquori, the Mexican attorney who assisted Mrs. Burns in obtaining her Mexican nationality, demonstrates that she voluntarily took these actions to obtain the benefits of Mexican citizenship with a clear understanding that she was transferring her allegiance to the Republic of Mexico. Thus, under *Savorgnan* v. *United States, supra,* and the principles enunciated by Chief Justice Warren in *Perez,* her actions constituted an abandonment of her United States citizenship.

The decision of the Court below can only be sustained if (1) *Afroyim* continues to represent the view of a majority of this Court, and (2) the reasoning of *Afroyim* is to be extended to the different provisions of the Nationality Act at issue here.

As the court below recognized, United States citizenship carries with it valuable rights. It is important, therefore, that all citizens have a clear knowledge of those actions which can result in expatriation. If the decision below was wrong, this Court should grant certiorari to make clear that the rationale of *Afroyim* does not apply to citizens who obtain foreign nationality. Otherwise, citizens may unwittingly expatriate themselves by applying for foreign nationality with the mistaken belief they can still retain their United States citizenship.

POINT II

The alternative holding of the Court below that principles of estoppel and laches prevent Mrs. Burns' Executor from correcting Mrs. Burns' mistake of law as to her true citizenship is in conflict with all prior precedents.

Beginning in 1947, Mrs. Burns indicated on a series of passport applications that she was a citizen of the United States and she filed United States tax returns as a citizen

for the period from 1956 to her death. Since both courts below found Mrs. Burns did not intend to renounce her citizenship when she obtained Mexican nationality, it is apparent that throughout this period Mrs. Burns honestly believed she was a United States citizen. In these circumstances neither principles of estoppel nor laches should preclude Mrs. Burns' Executor from asserting that she automatically lost her United States citizenship when she obtained Mexican nationality.

A. The Court of Appeals' Finding that Mrs. Burns' Executor Was Equitably Estopped from Asserting She Had Lost Her United States Citizenship Is Contrary to Settled Authority

Mrs. Burns' actions subsequent to her loss of citizenship reflect the fact that she was under the mistaken impression she still retained her United States citizenship. Based as they were on an erroneous interpretation of the law applicable to her citizenship, these actions should in no way affect the right of her estate to correct the effects of this mistake of law and file valid claims against the Government.*

The decision below is in conflict with a long line of cases from various circuits which have permitted a taxpayer whose earlier conduct was based on an innocent mistake of law to rectify his prior misapprehension of the law and to advance an apparently inconsistent position at a later date. See *Salvage* v. *Commissioner,* 76 F.2d 112 (2d Cir.

---

* Such an erroneous assumption on the part of a noncitizen would, of course, not estop the Government from contesting the alien's citizenship. *Peignand* v. *Immigration and Naturalization Service,* 440 F.2d 757 (1st Cir. 1971); *Wong Kwok Sui* v. *Boyd,* 285 F.2d 572 (9th Cir. 1960); *United States* v. *Watkins,* 165 F.2d 1017 (2d Cir. 1948). Conversely, a misapprehension of the law relating to her citizenship by Mrs. Burns should not estop her Executor from asserting her true citizenship as against the Government.

1935), *aff'd sub nom. Helvering* v. *Salvage,* 297 U.S. 106 (1936); *Commissioner* v. *Union Pac. R.Co.,* 86 F.2d 637 (2d Cir. 1936); *Helvering* v. *Schine Chain Theatres,* 121 F.2d 948 (2d Cir. 1941); *Helvering* v. *Brooklyn City R.Co.,* 72 F.2d 274 (2d Cir. 1934) (Hand, J.); *Bennet* v. *Helvering,* 137 F.2d 537 (2d Cir. 1943). See also *Ross* v. *Commissioner,* 169 F.2d 483, 496 (1st Cir. 1948) (Frankfurter, J.); *United States* v. *Albertson Co.,* 219 F.2d 920 (9th Cir. 1955); *Helvering* v. *Williams,* 97 F.2d 810, 812 (8th Cir. 1938).

The decision below is also in conflict with the well-established doctrine that the determination of the Passport Office in issuing a passport does not raise any estoppel because the proceedings are not of a judicial or even quasi-judicial nature. See, e.g., *Miller* v. *Sinjen,* 289 Fed. 388 (8th Cir. 1923). In a case closely analogous to the instant case the Third Circuit considered similar factors in determining what significance to give to a prior expression of opinion by the Commissioner of Immigration as to whether the plaintiff could be "considered a citizen of the United States" and reached a result directly contrary to that of the court below. *Delmore* v. *Brownell,* 236 F.2d 598, 599-600 (3d Cir. 1956). Similarly, the Ninth Circuit has consistently held that the determination of citizenship inherent in the granting of a certificate of identity by a Board of Special Inquiry "is not a judicial proceeding and does not have the force and effect of a judgment". *Lim* v. *Mitchell,* 431 F.2d 197 (9th Cir. 1970); *Lee Hon Lung* v. *Dulles,* 261 F.2d 719, 723 (9th Cir. 1958); *cf. Wong Kwok Sui* v. *Boyd,* 285 F.2d 572 (9th Cir. 1960). The absence of a real judicial proceeding and a final judgment is even more patent in this case where the State Department's determination, like that of the Commissioner in *Delmore* v. *Brownell, supra* at 600, does not even "possess quite the dignity of a determination of a Board of Special Inquiry". Compare, *Stella* v.

Graham-Paige Motors Corp., 259 F.2d 476 (2d Cir. 1958), *cert. denied,* 359 U.S. 914 (1959), and *Lewis* v. *Realty Equities Corp. of New York,* 396 F.Supp. 1026 (S.D.N.Y. 1975) (holding that extra-judicial statements to the S.E.C. and the I.R.S. did not estop party from asserting opposite position in court proceedings). Indeed, this Court has held that, far from being a proceeding such as would raise a quasi-judicial estoppel, the issuance of a passport is not even admissible evidence of United States citizenship. *Urtetiqui* v. *D'Arcy,* 34 U.S. 692 (1835). See also *Peignand* v. *Immigration and Naturalization Service, supra; Edsell* v. *Mark,* 179 Fed. 292 (9th Cir. 1910) (*per curiam*); *Miller* v. *Sinjen, supra.*

An analysis of the action taken by the Passport Office in 1953 with respect to Mrs. Burns' application clearly mandates a finding that it did not rise to the level of a judicial or quasi-judicial proceeding sufficient to warrant the invocation of collateral estoppel. Moreover, even if the Passport Office investigation were considered to be a judicial or quasi-judicial proceeding, the Passport Office did not rely on any statement by Mrs. Burns as to her citizenship—it conducted its own independent investigation and was aware that Mrs. Burns had obtained Mexican nationality and that as a matter of course, the Mexican Ministry of Foreign Relations would not issue a certificate of nationality unless the applicant filed an oath of allegiance and a renunciation of all other allegiances.

These facts demonstrate that the Government did not establish the detrimental reliance which, prior to the decision below, has uniformly been held necessary to a finding of estoppel. See *Helvering* v. *Schine Chain Theatres, supra,* 121 F.2d at 950; *Commissioner* v. *Union Pacific R. Co., supra; Hull* v. *Commissioner,* 87 F.2d 260, 262 (4th Cir. 1937); *Commissioner* v. *Mellon,* 184 F.2d 157, 159 (3d Cir. 1950).

B. The Application of the Doctrine of Laches to the Timely Filing of Claims for Tax Refunds by Mrs. Burns' Estate Is an Unprecedented Action Meriting Review by this Court

Despite the fact that the tax claims asserted herein were timely filed within the applicable statute of limitations, the Court of Appeals concluded that Mrs. Burns' Estate is barred by laches from raising the issue of Mrs. Burns' expatriation in either its direct suit for a tax refund or, in a rather novel interpretation of the law, as a defense to the Government's suit for a deficiency. This determination ignores the fact that Mrs. Burns' Executor complied with the Congressionally prescribed statutory period for the timely filing of refund claims. The Congressional statute of limitations is definitive. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). Laches applies only in the absence of any statute of limitations made applicable to equity suits. *Cf., Russell* v. *Todd,* 309 U.S. 280, 287. Moreover, the lower courts have consistently held that general equitable principles may not override this statutory requirement. *Kingston Products Corp.* v. *United States,* 368 F.2d 281 (Ct. Cl. 1966); *First National Bank of Montgomery* v. *United States,* 280 F.2d 818, 821 (Ct. Cl. 1960); *Young* v. *United States,* 203 F.2d 686, 689 (8th Cir. 1953). Thus, laches has no applicability to the timely filing of refund claims.*

---

* Even if the doctrine of laches were applicable to such claims, the doctrine of laches is inapplicable to the instant case because the Government did not prove any delay on the part of the Executor or prejudice to the United States. See *Russell* v. *Todd, supra* at 287. See also *Reconstruction Finance Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366 (2d Cir.), *cert. denied,* 346 U.S. 854 (1953); *Shell* v. *Strong,* 151 F.2d 909, 911 (10th Cir. 1945); *Ecology Center of Louisiana* v. *Coleman,* 515 F.2d 860, 867 (5th Cir. 1975). As soon as Mrs. Burns' Executor learned of all the facts relating to Mrs. Burns' citizenship, he promptly filed claims

(*footnote continued on following page*)

Moreover, any finding of laches is directly contrary to the recognized doctrine in tax cases that "each year is the origin of a new liability and of a separate cause of action". See e.g., *United States* v. *Rexach,* 482 F.2d 10, 19 (1st Cir.), *cert. denied,* 414 U.S. 1039 (1973). This same rule has been held applicable even when the status of a taxpayer is in issue. See *Stoddard* v. *Commissioner,* 141 F.2d 76, 80 (2d Cir. 1944).

Thus, there is no basis in law* or in fact for the application of the doctrines of estoppel or laches to this case. Since this decision, unprecedented as it is, has widespread ramifications for all taxpayers, this Court should grant certiorari to review the decision by the Court of Appeals.

(*footnote continued from preceding page*)

for refunds for all years not barred by the statute of limitations. The United States suffered no prejudice, since it collected from Mrs. Burns in income and gift taxes almost $191,000 more than it would have been entitled to if Mrs. Burns had been taxed as a nonresident alien. The statement in the Court of Appeals opinion, p. 2302, that the Government is prejudiced by its inability to call Mrs. Burns to rebut an allegation of expatriation is relevant only to a determination of subjective intent which is not in issue under *Savorgnan* v. *United States, supra.*

* The only case cited by the Court of Appeals in support of the doctrine of laches, *Simons* v. *United States,* 452 F.2d 1110 (2d Cir. 1971), does not lend support to the Court's application of laches in a tax case. That case involved an attempt by the decedent's wife to open up a *judgment* rendered more than 22 years prior to the plaintiff's motion. The Court treated that complaint as a motion for relief from a final judgment pursuant to F.R.Civ. P. 60(b) and held that there was no excuse for delay beyond the usual one year statutory time limit. In this case Mrs. Burns' citizenship was never determined in any prior judicial or quasi-judicial proceeding and her Executor's claim was timely filed. Moreover, in *Simons,* Mr. Simon's testimony was relevant to his intent at the time of his naturalization and his death precluded the Government from calling him as a witness. Here, however, Mrs. Burns' subjective intent is irrelevant under the teachings of *Savorgnan* v. *United States, supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
MARTIN, OBERMAIER & MORVILLO
1290 Avenue of Americas
New York, New York 10019
Attorneys for Petitioner

APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 595—September Term, 1975.

(Argued January 16, 1976 Decided March 3, 1976.)

Docket No. 75-6062

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Defendant-Appellant.

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

LUMBARD, SMITH and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court, Southern District of New York, Kevin T. Duffy,

Judge, granting summary judgment to the United States in consolidated action finding appellant liable for federal income taxes, interests, and costs for the year 1966, and dismissing appellant's complaint seeking a refund of gift taxes for the years 1966-68. Held that the decedent was a citizen of the United States in the years in question, that her estate is therefore fully liable for contested taxes, and that in any event her estate is estopped from claiming that decedent was expatriated from the United States in 1944.

Affirmed.

JOHN S. MARTIN, JR., Esq., New York, N.Y. (Herbert H. Chaice, Esq., Martin, Obermaier & Morvillo, Patterson, Belknap & Webb, New York, N.Y., of counsel), *for Appellant Matheson.*

MEL P. BARKAN, Assistant United States Attorney (Thomas J. Cahill, United States Attorney for the Southern District of New York, William S. Brandt, Assistant United States Attorney, of counsel), *for Appellee United States of America.*

MANSFIELD, *Circuit Judge:*

Since United States citizenship is considered by most to be a prized status, it is usually the government which claims that the citizen has lost it, over the vigorous opposition of the person facing the loss. In this rare case the roles are reversed. Here the estate of a wealthy deceased United States citizen seeks to establish over the government's opposition that she expatriated herself. As might be suspected, the reason is several million dollars in tax liability, which the estate might escape if it could sustain

the burden of showing that the deceased lost her United States citizenship. Although this appeal involves claims of gift and income tax liabilities amounting to only about $24,000, there waits in the wings of the Tax Court a pending estate tax dispute involving approximately $3.25 million, which turns on our resolution of the legal issues raised here. The size of the sum at stake has understandably produced zealous and ingenious legal arguments on the taxpayer's part. However, finding them without merit, we affirm the grant by the district court, Kevin T. Duffy, *Judge,* of summary judgment in favor of the government.

The facts essential to our decision are not in dispute. Dorothy Gould Burns, the granddaughter of the railroad magnate Jay Gould, was born in the United States in 1904. It is undisputed that she remained a United States citizen for the first 40 years of her life. Her pre-1944 history, insofar as it is pertinent, reveals that in 1919 she left the United States for Europe, never to re-establish residence in this country. In 1925 she married a Swiss Baron, Roland Graffenreid de Villars, their marriage producing two daughters but ending in divorce in 1936. Through this period Mrs. Burns traveled as a citizen of the United States, relying upon a United States passport until 1934. Thereafter, due to the concededly erroneous refusal of the Passport Office to grant a new passport, she travelled upon an "affidavit in lieu of passport" issued by the American Consulate. When the Germans occupied France, she returned to the United States in 1941 on a newly issued American passport but remained only briefly, soon departing for Cuba where she met her second husband, Archibald Burns, a Mexican national of Scottish parents. She followed Mr. Burns to Mexico where they married in 1944.

Now enters the crucial event of this story. Since an alien woman who married a Mexican man was a citizen by

naturalization under Mexican law, the Burns' contacted a Mexican attorney, Francisco Liguori, and applied to the Mexican Ministry of Foreign Relations for a certificate of her Mexican nationality. The pertinent paragraph of her petition for the certificate, which her executor now claims to have represented a renunciation of her nationality of origin, i.e., an act of expatriation terminating her United States citizenship, reads as follows:

> "I herewith formally declare my allegiance, obedience, and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin."

The government today argues, and this interpretation was adopted by the State Department in 1945 and again in 1953 when Mrs. Burns' request for a United States passport was held in abeyance pending resolution of the matter, that Mrs. Burns merely sought the certificate as evidence of her Mexican citizenship for two reasons entirely compatible with her simultaneous retention of United States nationality. First, it enabled her to obtain a Mexican passport, which simplified her problems with travel restrictions in that country and permitted her to establish permanent residence therein. Second, it enabled her to gain expedited entry into Mexico of her oldest daughter by her first marriage as a preferred immigrant.

It is also undisputed that throughout the remainder of her life, both Mrs. Burns and William Matheson, her lawyer at that time and her executor in this action, represented to others and acted as if the 1944 declaration did not constitute an act of expatriation. The most telling instances occurred in the course of her dealings with the United States Passport Office. On May 2, 1947, Mrs. Burns decided to resume her travels in Europe and accordingly applied to the State Department of the United States for a renewal of her American passport, claiming United States citizenship and stating under oath in her "Affidavit by Native American to Explain Protracted Foreign Residence" that she had "never taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state." She signed similar sworn statements in 14 other affidavits and passport applications until a year before her death in 1969. In fact, in 1952-1953, when the State Department delayed issuance of a passport to Mrs. Burns pending a determination of whether her Mexican marriage and acquisition of a Mexican naturalization certificate constituted expatriating conduct, Matheson represented Mrs. Burns in the discussions with the State Department, which resolved the matter by concluding that Mrs. Burns enjoyed dual citizenship and therefore qualified for a United States passport. In a letter to Mrs. Burns on the following day, March 24, 1953, Matheson advised that the validity of her United States citizenship was now firmly settled, although both parties plainly viewed her loyalty largely as a matter of practical expediency:

> "Now, first the decision that you are a United States citizen is favorable and we do not wish you to do anything to disturb it. This is true not so much from a United States tax standpoint as from the standpoint of the rights and privileges you will enjoy at the time of your father's death. It may help you to avoid any Mexican inheritance taxes then also. It may be that after his estate is settled we shall recommend that you renounce your United States citizenship if you are to

> continue living abroad in order to avoid any gift tax on creating a trust, but this is in the distant future. . . . Let me emphasize again, do not do anything in choosing that will put your United States citizenship in jeopardy."

The government offers a wealth of similar documentary evidence demonstrating that Mrs. Burns and Matheson continually believed and represented that she was a citizen of the United States. For example, during the post-1944 period, Matheson prepared for Mrs. Burns 21 separate federal tax returns in which they both stated under penalty of perjury that she was a United States citizen. In 1968 and 1969 Mrs. Burns and Matheson, respectively, informed the French taxing authorities that she was an American citizen, thereby excluding her United States income, largely in the form of municipal securities, tax exempt in this country, from French taxation as well. In three separate tax returns submitted to the French authorities in 1959, 1966, and 1969, Mrs. Burns announced her nationality as "American." Similarly in 1958 as a United States citizen she applied to the Coast Guard for American registration for her private yacht, thereby permitting its duty-free entry into France. And in 1969, Matheson reported her death to the appropriate American officials in France in a form entitled "Report of the Death of an American Citizen."

Despite this mass of evidence, appellant takes the position that as a matter of law Mrs. Burns expatriated herself in 1944 when she submitted her petition requesting a Mexican certificate of nationality. The executor raised this argument in two actions that have been consolidated for consideration by the district court and now by this court. In May 1973 the United States commenced an action in the Southern District of New York (73 Civ. 2011) against the executor to recover $6,948.97 of income taxes and

interest for the year 1966 on the ground that the government improperly had refunded this sum to Mrs. Burns' estate in reliance on her executor's claim that she was not a United States citizen in 1966. While this action was pending the executor initiated his own suit challenging the previous payment of $9,954.17 in gift taxes and interest for the years 1966-68 on the identical ground that Mrs. Burns was not a citizen during that period. In the consolidated action Judge Duffy on May 27, 1975, granted summary judgment in favor of the United States, holding (1) that Dorothy Gould Burns was a citizen of the United States throughout her lifetime and (2) that in any event her estate is estopped from today claiming that she expatriated herself in 1944. From these orders the executor appeals.

Discussion

Mrs. Burns' Citizenship

In deciding whether the district court acted properly in granting summary judgment in favor of the government, we are, of course, bound by a long-standing principle recently reaffirmed by us, see *Judge* v. *Buffalo*, 524 F.2d 1321 (2d Cir. 1975); *Heyman* v. *Commerce & Industry Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975); *Rhoads* v. *McFerran*, 517 F.2d 66, 67-68 (2d Cir. 1975), that the court's function upon a motion for summary judgment is not to resolve issues of fact but to determine whether any material factual issues are raised after resolving all questionable inferences in favor of the party against whom the judgment is sought. Only if no material factual issues exist may summary judgment be granted. However, it is equally true that summary judgment should not be denied where the only issues raised are frivolous or immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for

the district court, particularly where no jury has been demanded. See *Beal* v. *Lindsey,* 468 F.2d 287, 292 (2d Cir. 1972); *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.,* 113 F.2d 627, 628 (2d Cir.), *cert. denied,* 308 U.S. 597 (1940). To ascertain whether any material issues are raised we must first briefly review the principles governing expatriation of American citizens in Mrs. Burns' position and consider the undisputed evidence in the light of those principles.

Title 8 U.S.C. § 1481(a)(1) & (2), which governs the expatriation of American citizens,[1] provides in pertinent part:

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> (1) obtaining naturalization in a foreign state upon his own application . . .; or
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof. . . ."

Relying upon *Savorgnan* v. *United States,* 338 U.S. 491, 499-500 (1950), appellant argues that these sections of the Act provide clearcut objective guidelines specifying conduct by a citizen that will automatically result in his or her expatriation and that since Mrs. Burns' 1944 declaration fell within the terms of the statute she lost her American citizenship upon executing it.

This argument, however, is undermined by the Supreme Court's later decision in *Afroyim* v. *Rusk,* 387 U.S. 253

[1] This statutory provision virtually is identical to the Nationality Act of 1940, §§ 401(a) & (b), the statute in force in 1944 when Mrs. Burns petitioned for her Mexican certificate of nationality.

(1967), where the Court held unconstitutional another section of the Nationality Act which provided in similar unqualified terms that a United States citizen would lose his citizenship by voting in a foreign political election. Noting that the Fourteenth Amendment insures that "[a]ll persons born or naturalized in the United States . . . are citizens," the Court concluded that an act of Congress cannot strip an individual of his citizenship in the absence of a "voluntary relinquish[ment]" on his part. *Id.* at 268. The Court explicitly rejected earlier cases applying an objective test of the type favored by appellant here, under which a person would lose his American citizenship "regardless of [his] intention not to give it up." *Id.* at 255. *Afroyim's* requirement of a subjective intent reflects the growing trend in our constitutional jurisprudence toward the principle that conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such. Surely the Fourteenth Amendment right of citizenship cannot be characterized as a trivial matter justifying departure from this rule. Accordingly, there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen. See, e.g., *King* v. *Rogers,* 463 F.2d 1188, 1189-90 (9th Cir. 1972); *Jolley* v. *INS,* 441 F.2d 1245, 1249 (5th Cir.), *cert. denied,* 404 U.S. 946 (1971).

Appellant offers several grounds for distinguishing *Afroyim* and the "subjective-standard" cases which have followed in its wake. However, none of these distinctions is persuasive. First, he argues that *Rogers* v. *Bellei,* 401 U.S. 815 (1971), constitutes a *sub silentio* overruling of *Afroyim.* We disagree. In *Rogers* the Court upheld the constitutionality of § 301(b) of the Immigration and Nationality Act of 1952, which provides that one who acquires

American citizenship overseas through birth abroad to an American parent shall lose this citizenship unless he resides in this country for a minimum five-year interval between the ages of 14 and 28. As Justice Blackmun took pains to point out, *Afroyim* was not thereby repudiated, since it dealt with citizenship that is constitutionally protected under the Fourteenth Amendment, i.e., citizenship derived by virtue of birth in the United States or by naturalization in the United States, see e.g., *id.* at 822, 823, 827, 828, and 835, whereas the citizenship at issue in *Rogers* owed its existence solely to an act of Congress. What Congress granted it had the power to take away or to modify by subjecting its "generosity" to appropriate conditions precedent or subsequent, *id.* at 835, even though it would be powerless to strip a person of constitutionally-protected citizenship on the same grounds in the absence of a voluntary relinquishment on the citizen's part. Since Mrs. Burns was a United States citizen by birth, she could not lose her citizenship in the absence of proof that she intentionally relinquished it.

Appellant next argues that *Afroyim* should be limited to loss of citizenship by reason of voting in foreign elections and therefore should not apply to this case, which involves wholly different sections of the Nationality Act. However, we see no reason to accept such a narrow, indeed stilted, interpretation of *Afroyim*. In that case the Court reasoned that since the mere act of voting elsewhere does not necessarily demonstrate a relinquishment of allegiance or an expression of disloyalty to the United States, one must look beyond the citizen's bare conduct to determine whether he intended by so voting to forego his claim of citizenship. The same reasoning applies with equal force to a declaration of allegiance to a foreign sovereign or a petition for a certificate of Mexican nationality of the type executed by Mrs. Burns, which may simply represent the

citizen's claim of dual nationality rather than a turning of his back on the United States or a voluntary relinquishment of his American citizenship. See generally, *Nishikawa* v. *Dulles*, 356 U.S. 129, 135 (1958); *Kawakita* v. *United States*, 343 U.S. 717, 723-24 (1952); *Jalbuena* v. *Dulles*, 254 F.2d 379, 381 (3d Cir. 1958); *Peters* v. *Secretary of State*, 347 F. Supp. 1035, 1038 (D.D.C. 1972) (3-judge court). Furthermore, since the purely objective legal meaning of such a declaration is likely to turn upon highly technical interpretations of foreign, domestic, and international law concerning the status of dual nationals,[2] it would be unfair to strip an individual of his American birthright when he honestly but mistakenly believed that his conduct did not compromise his legal status as a United States citizen or as a dual national. Accordingly, to prevent such unfairness and to avoid questionable interpretations of the meaning and effect of a declaration or foreign naturalization petition, a citizen's specific intent to relinquish his citizenship must be proven before a statement of loyalty to a foreign sovereign is binding as an act of expatriation. This requirement of proof recognizes the overwhelming importance of American citizenship. As the Supreme Court only recently has reminded us, the status of citizen, despite the expanding protection afforded aliens under the Equal Pro-

[2] The United States has periodically investigated the question of whether women in the position of Mrs. Burns should be considered expatriated Americans or holders of both United States and Mexican citizenship. In 1945 and again in 1953, the United States State Department concluded that such persons had dual citizenship status. Appellant seeks to overturn this view by reference to diverse Mexican constitutional provisions, legislative enactments, and an executive memorandum as well as by an analysis of the relationship between Mexico and other nations (not including the United States) that had joined together in a 1936 international pact. One could hardly hold Mrs. Burns responsible had she in 1944 failed to grasp the "objective" legal consequences of her petition for a certificate of nationality.

tection Clause, remains central to the very definition of a social and political community. *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). An individual denied his or her United States citizenship, even if permitted entry into the country, is denied effective participation in our country's electoral processes, *id.* at 647-49, which is ordinarily regarded as a fundamental constitutional interest, as well as access to a range of livelihoods and positions opened only to citizens of this country, *id.* at 647. Indeed, the record reveals (see *supra*, p. 6) that in this case Mrs. Burns used her American citizenship to gain benefits which would not have been available to her as a Mexican national.

For these reasons we conclude that appellant could prevail only by establishing that Mrs. Burns, in executing her 1944 declaration, intended to expatriate herself rather than merely to assume the status of a dual national. Turning to the question of whether an issue of fact has been raised regarding her intent, we note that, in view of her unavailability to testify, the evidence on the subject, which was carefully analyzed by the district court, is almost entirely documentary in character, thus presenting a more appropriate case for summary judgment than would a proceeding involving live witnesses and unresolved issues of credibility.

The starting point for an evaluation of Mrs. Burns' intent lies in her December 21, 1944, declaration which was prepared by the Burns' Mexican counsel, signed by her and submitted to the Ministry of Foreign Relations of Mexico after the Burns' had requested their counsel to obtain a certificate of Mexican nationality for Mrs. Burns, based on her recent marriage and establishment of a domicile in Mexico. Without such a certificate Mrs. Burns would have had no tangible evidence that she had acquired Mexican citizenship through marriage to Burns. As evidence of her Mexican nationality such a certificate would aid her

in securing preferred immigation status for her daughter Rolande and facilitate permanent residence by Mrs. Burns in Mexico and her travel in and out of that country. Without a Mexican passport, obtainable through such proof of her status as a Mexican national, Mrs. Burns might have had difficulty entering, leaving, and remaining for long periods in Mexico.

Appellant characterizes Mrs. Burns' 1944 declaration—incorrectly in our view—as a "renunciation of nationality of origin," i.e., of United States citizenship. The passage upon which appellant relies reads:

> "I expressly renounce all protection foreign to said laws and authorities [of Mexico] and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic [of Mexico] any right inherent in my nationality of origin."

Although the declaration, when scanned superficially, may appear to support appellant's interpretation, a closer look reveals it to be merely a subscription to a basic principle of international law governing dual nationality: that a national of one country (e.g., United States) may not look to it for protection while she is in another country (e.g., Mexico), of which she is also a national. This principle has repeatedly been recognized by the Supreme Court of the United States. *Nishikawa* v. *United States, supra*, 356 U.S. at 132; *Kawakita* v. *United States, supra*, 343 U.S. at 733. Had Mrs. Burns wished to expatriate herself she could simply have unequivocally stated that she renounced her American citizenship. Compare, e.g., *Savorgnan* v. *United States, supra*, 338 U.S. at 495 n.3 ("I, Rosetta Andrus Sorge, born an American citizen, declare I renounce and in truth do renounce my American citizenship.

. . ."); *Jolley* v. *INS, supra,* 441 F.2d at 1247 (petitioner formally executed an Oath of Renunciation and announced "I renounced my United States citizenship, thus terminating all obligations to the United States."). Instead, she used language to the effect that as a Mexican national she could not claim her rights as a United States citizen "with respect to the Government of the Republic [of Mexico]. . . ." This limited surrender did not preclude her from claiming rights as a United States citizen *outside of* Mexico. See *Nishikawa* v. *United States, supra.* Indeed, once outside of Mexico she did not hesitate, consistent with this interpretation of her 1944 declaration, to invoke important rights and privileges inherent in her United States birthright. Thus we must conclude that the 1944 declaration amounted to nothing more than a statement of dual nationality.

Our reading of Mrs. Burns' 1944 declaration is in accord both with Mexican laws then in effect governing the nationality of non-Mexican women who married Mexican nationals and with the terms of the certificate of Mexican nationality issued to Mrs. Burns. Article 30(b) (II) of the Mexican Political Constitution as it existed in 1944 defines a "Mexican by naturalization" to include "[t]he foreign woman who contracts matrimony with a Mexican and has or establishes her domicile within the national territory." The Mexican Nationality and Naturalization Act of 1934, which was in force in 1944, similarly provided that an alien woman marrying a Mexican and establishing her domicile in Mexico thereby became a Mexican national, with the Ministry of Foreign Relations being directed in such a case to issue the necessary certificate.[3] In accord-

[3] Article 2 of the Act read in pertinent part:
"The following are Mexicans by naturalization:
"II. Any alien woman who marries a Mexican and who has or establishes her domicile within the national territory. . . .
"The Ministry of Foreign Relations will issue the corresponding declaration in this case."

• • • • • •

ance with these provisions the certificate of Mexican nationality issued to Mrs. Burns on January 2, 1945, did not provide that she "thereby" became a Mexican citizen; it merely confirmed that she had acquired Mexican nationality "as of the date of her marriage." On the strength of these provisions of Mexican law and the failure of Mexican officials to provide an interpretation to the contrary, the United States Acting Secretary of State in August 1945 instructed our Ambassador to Mexico that women such as Mrs. Burns are considered nationals of both the United States and Mexico.

The foregoing interpretation of the pertinent provisions of Mexican law was contemporaneously shared by knowledgeable officials in Mexico. In 1949 the Mexican naturalization law was substantially modified explicitly to require a renunciation of other citizenship in applying for a certificate of Mexican nationality. In reporting to the Mexican Congress as to how this 1949 amendment altered the law in force until that date, Oscar Trevino Rios, the Chief of the Legal Section of the Mexican Foreign Office, explained that previously foreign women who married Mexicans were treated as dual nationals while under the new law they must renounce foreign allegiance.

Thus, prior to the 1949 amendments of the Mexican Law of Nationality and Naturalization, which precluded a non-Mexican citizen from acquiring dual nationality, the generally accepted view was that a foreign woman who married a Mexican citizen thereby automatically acquired Mexican citizenship but did not lose her citizenship of origin, thus gaining dual nationality. That this was Mrs. Burns' under-

standing of her status as well as that of her lawyer and executor, William Matheson, during the remainder of her life, is attested to by an unwavering line of representations, statements, and actions by both in which they made it clear that Mrs. Burns did not intend her 1944 declaration to represent a forfeiture of her United States citizenship. Moreover, in personal communications between Matheson and Mrs. Burns, at a time when neither party would have had an incentive to misrepresent her national status, both assumed that Mrs. Burns had never renounced or in any way forfeited her United States citizenship. For example, when the State Department in 1952-53 delayed issuance of Mrs. Burns' passport pending determination of the legal significance of her 1944 Mexican declaration and marriage, Matheson wrote her letters on December 11, 1952, February 17, 1953, and March 24, 1953, assuring her that she remained a citizen of the United States and would prevail before the Passport Office.

Faced with these prevailing official contemporaneous interpretations of pertinent Mexican law and with overwhelming evidence that Mrs. Burns did not intend to relinquish her United States citizenship, appellant seeks to avoid summary judgment on two grounds. First he contends, on the basis of an opinion provided at his request in 1974 by the Legal Department of the Mexican Foreign Ministry, that a 1936 international conference (which included Mexico but not the United States) pledged the signatory countries to reduce instances of dual nationality whenever possible and consequently Mexico purportedly required a renunciation of other national ties as a precondition to Mexican naturalization. Whatever is the merit of this recently adopted view of Mexican law,[4] it raises no

[4] The 1974 opinion of the Foreign Ministry is at best ambiguous, representing the third opinion furnished by the Ministry at the request of the Burns family after two earlier ones appear to apply the wrong Mexican law. The opinion appears in conflict with the Mexican constitutional and statutory language in force in the 1940s, with the language of the certificate of nationality that was issued to Mrs. Burns, with the interpretation offered by the head of the Legal Department of the Foreign Ministry in the late 1940s when the naturalization law was modified to expressly require a renunciation by women like Mrs. Burns, and with the understanding of the United States State Department reached in 1944-45 after communication with Mexican officials.

material issue with respect to this case which under *Afroyim* is not concerned with current retrospective views of Mexican law but with *Mrs. Burns' understanding* of Mexican law in 1944 insofar as it might bear upon her intention voluntarily to relinquish her United States citizenship or to remain loyal to two countries. Viewed in this light, the evidence simply is overwhelming that Mrs. Burns did not interpret Mexican law as does her executor today, never formed the requisite intent to expatriate, and consistently viewed herself as a dual national of both the United States and Mexico. Nothing in the Mexican Government's 1944 conduct or pronouncements could have indicated to her in any way that her receipt of a Mexican certificate of nationality must be coupled with a renunciation of United States citizenship. On the contrary, the terms of the certificate issued to her by Mexico in January, 1945, by confirming that she acquired her Mexican citizenship "as of the date of her marriage," indicated that there was no need for her to renounce her loyalty to the United States. As seen earlier this interpretation was not only consistent with prevailing Mexican law then in force but also with the view of the United States then and now.

Although the Mexican Foreign Office in 1974 has advised through appellant that these earlier interpretations are incorrect and that the 1949 amendments merely were designed to codify rather than change pre-existing law, there is no evidentiary basis for imputing to Mrs. Burns' knowl-

edge of this belated Mexican interpretation, which comes some 30 years after the fact. In light of the plain wording of the document she signed, the certificate she sought and obtained, and the contemporaneous pronouncements of both our government and Mexico, she could not have known in 1944 (or for the balance of her life) that her declaration of allegiance to Mexico would be taken to represent a voluntary act of expatriation toward the United States. No material issue, therefore, is raised by the Mexican Foreign Office's 1974 opinion.

As a second basis for raising a material factual issue as to Mrs. Burns' intent to expatriate herself, appellant proposes to offer the testimony of her Mexican lawyer, Francisco Liguori, regarding his explanation to her of the language of her 1944 declaration at the time that she signed it. However, we have already had the benefit of his deposition testimony on the same subject matter in which, despite leading questions by appellant's counsel, he offered no evidence from which an inference of knowing and voluntary relinquishment of American citizenship might be drawn. His pertinent testimony amounted to nothing more than proof that he acquainted her with the substance of the declaration itself which, as we have seen, is not expatriating in nature. While normally we would deny summary judgment in the face of an offer of live testimony which, if found credible by the trier of the fact, might support a material inference adverse to the movant, here there is no indication that Liguori's live testimony would add anything substantial to his deposition, which fails completely to bolster the estate's claim that Mrs. Burns intended in 1944 to renounce her United States citizenship. In this connection it must furthermore be remembered that the burden of proving her expatriation, which appellant has assumed, is a heavy one. The party arguing for loss of citizenship must support his argument by "clear,

convincing and unequivocal evidence." *Nishiwaka* v. *Dulles, supra,* 356 U.S. at 133. Ambiguities in the evidence are to be resolved in favor of citizenship, *id.* at 136; *Perkins* v. *Elg,* 307 U.S. 325, 337 (1939), and courts must strain to construe both facts and applicable law "as far as is reasonably possible in favor of the citizen." *Scheiderman* v. *United States,* 320 U.S. 118, 122 (1943).[5] Thus Liguori's testimony, even accepted as fully credible, could not hope to satisfy this heavy burden, in light of the remaining undisputed evidence in this case that not only fails to show that Mrs. Burns intended expatriation but, on the contrary, overwhelmingly supports the inference that she sought and obtained dual nationality.

Estoppel

In any event, the record is clear that her estate would now be estopped from asserting her loss of citizenship today. For a period of more than 20 years after her 1944 declaration, Mrs. Burns and her attorney, William Matheson, who here acts as her executor, repeatedly represented to the United States Government under oath that she continued to be a citizen of the United States and that she had never taken an oath of affirmation or allegiance to a

---

[5] Title 8 U.S.C. § 1481(c) provides that the party seeking a citizen's expatriation must "establish such claim by a preponderance of the evidence." But *Afroyim's* requirement of a specific intent adds a constitutional element to loss of citizenship that is not found in the statute and the strong preference exhibited by *Afroyim* and earlier cases for retention of citizenship establishes, as the Attorney General of the United States recognizes, "that this burden is not easily satisfied. . . .," 42 Op. Atty. Gen., No. 34 at 4 (1964). In fact, a heavy burden of proving intent to expatriate is particularly appropriate in cases where the citizen apparently believed that he was a dual national since a person is unlikely to have voluntarily relinquished his United States citizenship if he believed himself eligible to remain loyal to two countries and thereby receive the benefits of both nationalties. See, e.g., *Peter* v. *Secretary of State,* 347 F. Supp. 1035, 1038-39 (D.D.C. 1972) (3-judge court).

foreign state. These representations led to an investigation in 1953 by the United States State Department, which concluded, in a decision characterized by appellant as an "adjudication," that Mrs. Burns had retained her United States citizenship. In reliance upon these representations of United States citizenship the United States made available to Mrs. Burns a host of benefits, including (1) the issuance to her of United States passports on 15 different occasions, (2) the issuance by the United States Coast Guard of a license for her yacht, entitling it to fly the American flag and gain duty-free entrance into France, and (3) registry of her as an American citizen with the United States Mission in France, entitling her to assistance by United States officials overseas. As an American citizen she furthermore was excused from payment of taxes to the government of France, which would otherwise have been levied on her income.

The United States, having furnished these benefits to Mrs. Burns in reliance upon her numerous representations of loyalty to it, is entitled to her estate's observation of her corresponding obligations, including the payment of taxes. Cf. *Cook* v. *Tait,* 265 U.S. 47, 56 (1924); *United States* v. *Bennett,* 232 U.S. 299, 307 (1914). Courts now routinely hold that one gaining governmental benefits on the basis of a representation or asserted position is thereafter estopped from taking a contrary position in an effort to escape taxes. Two cases are particularly relevant to the facts here. In *Rexach* v. *United States,* 390 F.2d 631, 632 (1st Cir.), *cert. denied,* 393 U.S. 833 (1968), the taxpayer earlier had renounced his American citizenship but thereafter succeeded in acquiring a United States passport by representing to the State Department that the renunciation had been involuntarily given. In a subsequent action by the government for taxes owed the court found and the taxpayer conceded that "as a matter of law he is precluded

by the record for claiming that he ever ceased to be a United States citizen. . . ." Similarly in *Kurz* v. *United States,* 156 F. Supp. 99, 106 (S.D.N.Y. 1957), *aff'd on opinion below,* 254 F.2d 811 (2d Cir. 1958), where the decedent had throughout his lifetime "performed acts of control" over a trust and "obtained the advantages of his reservation of power. . . ." the court held that his executors were estopped to challenge the inclusion of the principal of the trust in his taxable gross estate, concluding that "his representatives should not now be permitted to take an inconsistent stand to the detriment of the Government, which has appropriately imposed the tax in reliance upon the decedent's act." See also *Commissioner* v. *National Lead Co.,* 230 F.2d 161 (2d Cir. 1956), *aff'd without reaching issue,* 352 U.S. 313 (1957) (taxpayer who received a tax benefit from the War Production Board thereby forfeits his right to later challenge the authority of the same Board with respect to a different transaction).

Appellant contends that such a finding of collateral or equitable estoppel is not warranted where the party against whom it is asserted acted under an innocent misapprehension of the law. Regardless of the validity of this premise, however, it has no application to the undisputed facts of this case. Mrs. Burns and her lawyer repeatedly swore not only that she was a citizen of the United States but that she had never made an oath or declaration of allegiance to a foreign sovereign. Thus they represented *both* that she had neither formed the subjective intent to expatriate nor performed the objective acts proscribed by the Nationality Act. Regardless of Mrs. Burns' understanding of American naturalization law, these statements would preclude her estate from today asserting that she had misrepresented her conduct. The deliberate and devious nature of appellant's representations is further underscored by his March, 1953, letter to Mrs. Burns stating that

she should not do anything "that will put your United States citizenship in jeopardy" but should reserve possible renunciation of citizenship for a later date when non-citizenship might carry tax advantages.

Nor can we accept the contention that because the Passport Office knew as early as 1953 of Mrs. Burns' Mexican citizenship certificate, the government failed to establish detrimental reliance on her numerous statements under oath that she was a United States citizen. This conveniently ignores the fact that, based upon her representations of citizenship, Mrs. Burns applied for and was granted at least three passports prior to 1953. Furthermore the United States Passport Office, contrary to appellant's contention, Brief at 34, was satisfied that the Mexican Government, considering Mrs. Burns a Mexican citizen by marriage, did not require her United States expatriation, with the result that she "possessed dual nationality." Memo of Mr. Curry, Passport Division, Mar. 23, 1953. This belief was not contradicted by Mexican officials or by Matheson in 1953 when he took Mrs. Burns' case before the Passport Office.

Thus Mrs. Burns' and Matheson's affirmations of her United States citizenship were directly relevant to the Passport Office's inquiry concerning her eligibility for a United States passport and to all similar subsequent determinations by American agencies running favorably to Mrs. Burns. Mrs. Burns and her estate cannot simply "blow hot and cold" in their dealings with the government, *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 513 (1953). At this late date her estate is estopped to deny this long line of representations of decedent's United States citizenship.

Laches

In any event appellant is barred by laches from raising the issue of Mrs. Burns' expatriation in either his direct suit for a tax refund or as a defense to the government's suit for a deficiency. For over 24 years Mrs. Burns and appellant had many opportunities, when her United States citizenship was questioned, to assert or seek an adjudication that she had expatriated herself. However, on the contrary, she chose not only to represent that she was a United States ctizen but to receive the benefits and perform the duties (including payment of taxes) of an American citizen. Having waited until Mrs. Burns' death, thereby preventing the government from calling her as a witness to contradict appellant's present position or even to explain her contrary behavior throughout her lifetime, appellant is precluded by his long delay from now asserting for the first time that she lost her United States citizenship in 1944. In a similar context, when a wife challenged the 1948 naturalization of her husband as a United States citizen, we in *Simons* v. *United States,* 452 F.2d 1110, 1116-17 (2d Cir. 1971), held that she was precluded by laches from asserting such a contention, stating:

> "If we entertained a different view on the points so far discussed, we would nevertheles affirm the order of dismissal and denial, on the ground of laches. Both the complaint and the motion turn on John Simons' intention to reside in the United States when he and his wife petitioned for naturalization . . . 22 years before these proceedings were brought. His testimony would have been of the utmost importance. . . . If the facts were as Mrs. Simons now represents, they must have been known to her long ago. The papers reveal no reason for the inordinate and prejudicial delay. . . . Apparently Mrs. Simons was quite

content with the situation until the divorce in 1964; even then she did nothing until her husband's death in 1968 opened new vistas at a time when contradiction by him was no longer possible."

Appellant argues that the government, having collected over $190,000 in gift and income taxes from Mrs. Burns during her lifetime, cannot demonstrate any prejudice from the estate's delay in challenging decedent's citizenship. We disagree. The government is prejudiced because in seeking to collect taxes ordinarily owed it by United States citizens it is compelled to rebut an allegation of expatriation that is now over 30 years stale, with the key witness, Mrs. Burns, unavailable either to contradict this allegation or to explain her inconsistent conduct in the years following 1944. That Mrs. Burns paid sizeable gift and income taxes during her lifetime does not therefore alter the equitable considerations favoring the government. A citizen's duties to pay taxes are neither fungible nor divisible. The government is entitled to all taxes due from its citizens' estates.

The order of the district court is affirmed.

APPENDIX B

Opinion of District Court.

KEVIN THOMAS DUFFY, D.J.

Both the plaintiff, the United States, and the defendant, William L. Matheson as executor of the estate of Dorothy Gould Burns, have moved for summary judgment in the first action by the government to recover an income tax refund of $10,790.99 made to Mrs. Burns' estate (73 Civ. 2011). Additionally, the government has moved to consolidate a related case (*United States* v. *Matheson,* 74 Civ. 2437 (KTD)) in which Mr. Matheson, as executor, has challenged a determination by the Internal Revenue Service that the Burns estate is not entitled to refunds of close to $10,000 in gift taxes paid by Mrs. Burns in 1966, 1967 and 1968. Mr. Matheson's only objection to such a consolidation was on the grounds that he would be limited in discovery which he sought in the other suit. However, the document, a report from the Mexican Ministry of Foreign Relations, which was at the core of this objection has since been turned over by the government and Mr. Matheson's objection is therefore obviated.

Because the issues raised in the related action between the same parties are identical to those raised in the instant case, the motion to consolidate the two cases will be granted, and my ruling on the motions for summary judgment will be dispositive of both cases. It is also noteworthy that a proceeding brought by Mr. Matheson in the United States Tax Court to challenge the Internal Revenue's assessment against Mrs. Burns' estate of approximately 3½ million dollars in estate tax deficiencies has been stayed pending the outcome of the case at hand.

The basis on which the income tax refund was made and other tax refunds have been claimed is that Mrs. Burns allegedly expatriated herself from the United States in 1944. The underlying facts are not materially disputed.

Dorothy Gould Burns, born in 1904 in the United States, lived abroad in Europe from 1919 to 1941 during which time she married a Swiss nobleman and bore with him two daughters. When that marriage did not work out in 1934 Mrs. Burns, whose 1919 passport had expired, returned briefly to the United States on the basis of an affidavit in lieu of passport issued by the American Consulate in Paris, France. Her application for a passport was rejected and Mrs. Burns was apparently incorrectly informed that her marriage and extended residence abroad constituted presumptive loss of U. S. citizenship which could be regained only by naturalization. She did not undertake such naturalization proceedings and returned to Europe where in 1936 she was divorced from the Swiss nobleman. Thereafter, she lived abroad and used another affidavit in lieu of a passport in her travels until 1940 when she sought to leave Europe. The German invasion of France had prompted Mrs. Burns' departure, but she was denied entry into Portugal (her intended point of departure) because she lacked a passport. The Department of State, through the American Consulate in Spain, then granted Mrs. Burn's application for a passport for the limited purpose of passing through Spain and Portugal to the United States. The passport expired in November, 1940. In the year 1941 Mrs. Burns left the United States for Cuba where she met Mr. Burns, a native Mexican of Scottish ancestry, who was to become her second husband. In 1942 the two went to Mexico where in May, 1944, they were married. A third daughter was born to Mrs. Burns of this marriage. In December, 1944 Mrs. Burns executed an application for a certificate of Mexican nationality. The certificate was granted.

It is the execution of this application for a certificate of Mexican nationality which the executor claims expatriated Mrs. Burns from the United States. The government on

the other hand contends that the application was not expatriating either in fact or in Mrs. Burns' subjective intent. Moreover, the government argues that the estate is estopped from claiming such an expatriation.

The actual application for a certificate of nationality will be discussed infra; however, the events following the execution of the 1944 application are essential to an understanding of the various claims and will be reviewed first.

In 1946, Mrs. Burns applied to the Mexican government for the immigration of her oldest daughter, Rolande, as the daughter of a Mexican national.

In 1947 Mrs. Burns, although in possession of a Mexican passport, applied for a United States passport. In this application she made no mention of her application for a certificate of Mexican nationality and misstated her husband's citizenship as British, rather than Mexican. The passport was granted and repeatedly renewed, even after Mrs. Burns revealed that her husband was, in fact, a Mexican and after the State Department, on investigation, learned that Mrs. Burns had been issued a certificate of Mexican nationality.

In 1953 apparently Mrs. Burns went to France to visit her ailing father. She remained in France for the rest of her life, becoming in 1956, the year of her father's death, a permanent resident of France. Mrs. Burns died in 1969. After the death of Mrs. Burns, the executor of her estate learned of her 1944 application for a certificate of Mexican nationality and based upon it filed claims for refunds of income and gift taxes for the years 1966-1968 and for an overpayment of estimated taxes in 1969.

The lawsuits consolidated herein were brought (1) by the government to recover the refund of 1966 income tax (refunds made for 1967 and 1968 have not yet been challenged by the government) and (2) by the executor to recover gift taxes for 1966, 1967 and 1968. As noted above, a proceeding by the executor in the Tax Court

challenging the assessment of an estate tax deficiency of approximately 3½ million dollars has been stayed pending the determination of this case since the identical issues are involved in both.

The application for a certificate of nationality which is at the center of this controversy was executed by Mrs. Burns in 1944. It was prepared in Spanish by a Mexican attorney, Francisco Liguori, and reads in pertinent part:

> "I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the government of the Republic any right inherent in my nationality of origin." (From a translation certified as accurate by the Lawyer's & Merchant's Translation Bureau).

The executor of Mrs. Burns' estate repeatedly characterizes this declaration as a renunciation of American citizenship. Both the government and the executor devote a substantial portion of their most exhaustive briefs arguing whether this declaration was in 1944, required by Mexican law.

Mexico's Nationality and Naturalization Law, Article 2, as I find it, was amended as of December 31, 1949 to explicitly require of an alien marrying a Mexican a renunciation of other citizenships and a protest of allegiance to Mexico. According to Mr. Matheson, this amendment was simply a codification of a pre-existing requirement. It is his position that women marrying Mexican citizens did not become Mexican citizens themselves until they became naturalized by applying for and receiving a certificate of nationality.

The government contends that such women became Mexican citizens by operation of law upon contracting a valid marriage with a Mexican citizen. Such declarations of allegiance were, in the government's view, purely administrative requirements of the Mexican Foreign Ministry, not dictated by law.

The significance of the differing interpretations of the Mexican law is that if citizenship were not acquired automatically upon marriage, then the oath was undertaken to procure citizenship and may indicate an intention to abandon United States citizenship. If, however, Mrs. Burns became a Mexican citizen immediately upon marriage, then her application for a certificate of nationality can be seen as a routine act of a dual citizen availing herself of a perogative of her Mexican nationality. See *Kawakita* v. *United States,* 343 U.S. 717 (1952); *Jalbuena* v. *Dulles,* 254 F.2d 379 (3d Cir.1958).

The arguments developed by the parties as to whether the 1949 law merely restated or changed existing law are both very persuasive. However, a close reading of the pre-amendment statute indicates that even if it was necessary under the old law to apply for a certificate of naturalization, the oath required was merely on oath of allegiance to Mexico, not an explicit renunciation of one's former country as required by the 1949 amendment. As such, the intent of the declarant, in this case Mrs. Burns, in making the oath is not explicit on the face of the application. This is true because an oath expressly renouncing United States citizenship, as is required by the 1949 amendment would leave no room for ambiguity as to the intent of the applicant. However, an oath of allegiance to Mexico, without more, by one believing herself already a Mexican citizen by virtue of marriage, could be merely descriptive of her status as a dual citizen of both Mexico and the United States. See *Kawakita* v. *United States,* 343 U.S. 717 (1952); *Jalbuena* v. *Dulles,* 254 F.2d 379 (3d Cir. 1958);

Tanaka v. *I.N.S.*, 346 F.2d 438, 448 (2d Cir. 1965) (Kaufman, J., dissenting).

In fact, the oath taken by Mrs. Burns contained just such a declaration of allegiance to Mexico, but contained no renunciation of her United States citizenship. The only language which is even susceptible of misinterpretation as a "renunciation" of United States citizenship is that portion of the declaration in which Mrs. Burns:

> "renounc[ed] all protection foreign to said laws and authorities [the laws and authorities of Mexico] and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the government of the Republic any right inherent in my nationality of origin."

However, it is a recognized fact of international law that a dual national is never entitled to invoke the protection or assistance of one of the two countries while within the other country. See *Nishikawa* v. *United States*, 356 U.S. 129, 132 (1958); *Kawakita* v. *United States*, 343 U.S. 717, 733 (1952). Thus, by that part of the declaration Mrs. Burns forfeited no rights as an American if in fact she believed herself to be a dual national. In fact, the language quoted above tracks the language of the pre-1949 statute (Article 17 of the Mexican Nationality and Naturalization Law) which was altered by the December 31, 1949 law to require an express renunciation of the declarant's nationality of origin.

It becomes, then, crucial to look to Mrs. Burns' intent in executing the application for a certificate of nationality. An oath of allegiance to another sovereign will not be construed as expatriating without proof of subjective intent to renounce United States citizenship. See *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *King* v. *Rogers*, 463 F. 2d 1188 (9th Cir. 1972); *Tanaka* v. *I.N.S.*, 346 F. 2d 438, 448 (2d Cir. 1965).

On the question of Mrs. Burns' subjective intent in applying for the certificate of nationality there is considerable evidence that she believed herself to be a dual citizen of the United States by birth and of Mexico automatically by marriage. Mrs. Burns' attorney at the time of the application, Francisco Liguori, stated in his deposition that upon marriage she became a Mexican "as a matter of law" and that the certificate was merely a recognition of that fact by the ministry of Foreign Relations. In numerous documents, including a 1953 application for a United States passport, Mrs. Burns reiterated the fact that her Mexican citizenship existed by virtue of her marriage to a Mexican. The certificate of nationality itself recites that "she acquired the Mexican nationality as of the date of her marriage." Even Mr. Matheson's first affidavit in support of the motion for summary judgment contains an admission that upon her marriage Mrs. Burns became a Mexican citizen, although he later argues that such a theory is unknown to Mexican law. The fact that Mrs. Burns had, years earlier, been erroneously informed that she had lost her U.S. citizenship by virtue of her marriage to a Swiss Baron is irrelevant since she had subsequently applied for and received a United States passport.

It is clear from the record that Mrs. Burns applied for the certificate (1) so that her daughter, Rolande, could immigrate to Mexico as a preferred immigrant with a Mexican parent and (2) in order to obtain a passport since a Mexican citizen could neither leave nor enter the country without one, and a certificate was necessary for the acquisition of a passport.

There is also considerable argument by the parties about Mrs. Burns' facility in the Spanish language and thus her understanding of the oath. However, her executor's insistence that she was fluent in Spanish is accepted. This being so, Mrs. Burns must have understood that the

words in the oath, as discussed above, contained no renunciation of her United States citizenship. For this reason the oath will speak for itself since, as Mr. Matheson himself argues, she was bound by the contents of a document she signed. The oath itself overcomes the ambiguous testimony of Francisco Liguori at his deposition. According to Mr. Matheson's understanding of the testimony, Liguori told Mrs. Burns some 30 years ago that by executing the application for a certificate, she was renouncing her American citizenship. It is unclear that this was, in fact, what Liguori said to Mrs. Burns. Rather, his testimony must be read as saying that he merely restated the oath to Mrs. Burns, explaining that she was forfeiting the protection of all foreign countries against Mexico.

Mr. Matheson cites numerous cases in which American citizens lost their American citizenship by becoming naturalized citizens of other countries. See, *e.g.*, *Savorgnan* v. *United States*, 338 U.S. 491 (1950); *King* v. *Rogers*, 463 F. 2d 1188 (9th Cir. 1972). However, in *Savorgnan*, which was incidentally pre-*Afroyim*, the individual explicitly renounced her United States citizenship as a pre-condition of her naturalization as an Italian citizen. Likewise in *King*, the plaintiff demonstrated that he had the requisite intent for loss of citizenship when he became a British subject and informed the American Consulate that he was willing to make a formal renunciation.

These cases are clearly distinguishable from Mrs. Burns' case in which there was no explicit renunciation; the subjective intent to expatriate herself was lacking; and her citizenship was apparently by operation of law—not by naturalization undertaken by Mrs. Burns. To be sure the Mexican law speaks of women marrying Mexicans as naturalized Mexican citizens; but this is a semantic argument. The weight of the proof indicates that Mrs. Burns acquired Mexican citizenship upon marriage and that the application for and issuance of the certificate constituted an additional formality executed for, as the certificate itself states, "legal use which may be convenient. . . ." This was no renunciation process as in the cases cited above.

Finally, on the question of intent, the subsequent acts of the now deceased Mrs. Burns have to be probative. See *Kawakita* v. *United States*, 343 U.S. 717 (1952) wherein a single application for a U.S. passport after the allegedly expatriating act was considered on the question of intent. After applying for and receiving a certificate of Mexican nationality, Mrs. Burns repeatedly applied for and received United States passports; paid United States income and gift taxes as a citizen; represented to French authorities that she was an American citizen; and even sailed a pleasure boat under an American flag and a license issued upon her certification that she was a citizen of the United States. Certainly, all of these actions are consistent with and compel the conclusion that Mrs. Burns intended to remain and believed herself to be a United States citizen.

The executor argues that Mrs. Burns did not believe herself to be a United States citizen. Desiring the comfort and convenience of travelling on an American passport, she allegedly lied in her passport applications by representing herself as an American citizen and, in one application, representing her husband to be a British, rather than a Mexican, subject. Moreover, the executor argues that such a misstatement taints the credibility of her other representations in applications for United States passports. If this is true, then the government must succeed on its alternative theory of equitable estoppel. The executor of Mrs. Burns' estate stands in the same position as the deceased would were she a party to this litigation. See *Simons* v. *United States*, 333 F. Supp. 855 (S.D.N.Y.) aff'd on other grounds, 452 F.2d 1110 (2d Cir.1971); *Kurz* v. *United States*, 156 F. Supp. 99 (S.D.N.Y.), aff'd 254 F. 2d 811 (2d Cir. 1957). Mrs. Burns' repeated lies (accepting arguendo that characterization of her state-

ments) to the government that she was an American citizen, estop her estate from now claiming that she was not an American citizen, and that her income and gift taxes should be refunded.

The executor attempts to counter that an estoppel argument is unavailable to the government since it neither relied on Mrs. Burns' misstatements nor suffered any detriment. This contention of no reliance is based on the fact that the government eventually learned that Mrs. Burns had been issued a certificate of nationality and knew that it was the policy of the Mexican government to require an oath of the applicant before issuing such a certificate. However, the United States government consistently believed, and there is a multitude of documentary evidence on this, that, despite any subsequent conflict in the interpretation of Mexican law, such an oath was an administrative requirement not to be construed as expatriating. This being so, the knowledge that the certificate had been issued in no way precluded the government's reliance on the representations of Mrs. Burns that she was an American citizen.

As to whether the government suffered any detriment, the issuance of United States passports and licenses based upon fraudulent representations must clearly be seen as detrimental reliance which will support an estoppel. See *Simons* v. *United States,* 333 F. Supp. 855 (S.D.N.Y.), aff'd on other grounds, 452 F. 2d 1110 (2d Cir.1971). The contention by the executor that it was the United States which, by the receipt of Mrs. Burns' taxes, was unjustly enriched merits no comment. As was said by Mr. Justice Douglas in *Kawakita, supra,* "one cannot turn it [American citizenship] into a fair-weather citizenship . . ." 343 U.S. at 736.

There being no disputed material facts, either of the two theories set out above supports and award of summary

judgment in favor of the United States. Either the oath did not constitute a renunciation by Mrs. Burns of her American citizenship and she was a dual national, or her conduct in misrepresenting herself as an American citizen estops the executor of her estate from claiming otherwise. It is unnecessary to reach the merits of the government's collateral estoppel argument.

/s/ KEVIN THOMAS DUFFY
U. S. D. J.

Dated: New York, New York
May 8, 1975

No. 75-1651

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM L. MATHESON, EXECUTOR OF THE WILL OF DOROTHY GOULD BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JONATHAN S. COHEN,
GEORGE G. WOLF,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1651

WILLIAM L. MATHESON, EXECUTOR OF THE WILL OF DOROTHY GOULD BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B 25a-35a) is reported at 400 F. Supp. 1241. The opinion of the court of appeals (Pet. App. A 1a-24a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1976. The petition for a writ of certiorari was filed on May 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a native-born American's marriage to a Mexican national and subsequent application in 1944 for a

certificate evidencing her Mexican nationality resulted in her automatic expatriation under Section 401 of the Nationality Act of 1940, so as to enable her to avoid imposition of federal income, estate and gift taxes.

2. If the native-born American's 1944 application for Mexican nationality resulted in expatriation, whether her subsequent invocation of American citizenship during the remaining 25 years of her life bars her executor from now asserting her expatriation to avoid federal taxes.

STATUTE INVOLVED

The pertinent provisions of Section 401 of the Nationality Act of 1940, 54 Stat. 1168, are as follows:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person * * *; or
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; * * *

STATEMENT

Petitioner is the executor of the estate of Dorothy Gould Burns, who was born in 1904 of American parents in the United States. In 1919, decedent left the United States for Europe, and she never re-established residence here. In 1925 she married Baron Roland Graffenreid de Villars, a Swiss citizen. There were two daughters born of that marriage, which ended in divorce in 1936. Following the German occupation of France, decedent returned briefly to the United States in 1941. Shortly thereafter, she travelled to Cuba where she met her second husband, Archibald Burns, a Mexican national of Scottish descent. She followed Burns to Mexico where they were married in 1944 (Pet. App. A 3a).

Under Mexican law, an alien woman who married a Mexican citizen became a Mexican citizen by naturalization. Consequently, decedent sought and received a certificate evidencing her Mexican nationality from the Mexican Ministry of Foreign Relations (Pet. App. A 3a-4a). It was advantageous for decedent to secure this certificate for two reasons. First, it facilitated the immigration into Mexico of her daughter, Rolande. Secondly, it allowed decedent to obtain a Mexican passport, which was required for a Mexican citizen to leave or enter that country (Pet. App. B 31a). The application for the certificate which decedent signed in 1944 contained the following declaration (Pet. App. A 4a):

> I herewith formally declare my allegiance, obedience, and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin.

Thereafter, in 1947, decedent applied for and received a United States passport. At that time, she executed an "Affidavit by Native American to Explain Protracted Foreign Residence" in which she swore that she had "never taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state." Decedent made similar sworn statements in 14 other affidavits and passport applications filed with the United States authorities until a year before her death in 1969 (Pet. App. A 5a).

During 1952 to 1953, the State Department delayed issuance of an extension of decedent's passport in order to investigate the circumstances surrounding her receipt of Mexican nationality. Petitioner William L. Matheson represented decedent before the State Department in those proceedings, which culminated in a determination that she enjoyed dual citizenship and therefore qualified for a United States passport. On March 24, 1953, petitioner wrote to decedent advising her of this determination, pointing out its advantageous aspects, and cautioning her to take no action which might jeopardize her United States citizenship, awaiting such time as the balance of her interests might swing in favor of expatriation (Pet. App. A 5a-6a).

From 1944 until her death in 1969, decedent evidenced and took advantage of her United States citizenship in a variety of other ways. During that period, she filed 21 separate federal tax returns, which had been prepared by petitioner, in which she swore that she was a United States citizen. She made similar declarations of United States citizenship to the taxing authorities in France,[1] on the strength of which certain of her United States source income (consisting largely of interest on municipal securities exempt from United States income taxation) was determined to be exempt from French taxation. Finally, in 1958, decedent invoked her American citizenship in order to apply to the United States Coast Guard for American registration of her private yacht, which permitted its duty-free entry into France (Pet. App. A 6a).

This case consists of two consolidated actions involving federal taxes respectively instituted by the United States and petitioner against each other in the United

[1]Decedent travelled to France in 1953 and established residence in that country in 1956 (Pet. App. B 27a).

States District Court for the Southern District of New York. The United States sought to recover from petitioner $6,948.97 of income taxes and interest for the year 1966 alleged to have been erroneously refunded to decedent's estate. Petitioner sought to recover from the United States $9,954.17 in gift taxes and interest for the years 1966 through 1968 (Pet. App. A 6a-7a). In each case, the determination of liability turned on whether decedent was a United States citizen.[2]

Both the district court and the court of appeals rejected petitioner's argument that decedent's 1944 application for a certificate of nationality resulted in her expatriation and held that decedent was subject to United States tax. In the lower courts' view, decedent did not have the requisite intent to expatriate herself under *Afroyim* v. *Rusk*, 387 U.S. 253, and the statements made in her application for a certificate of Mexican nationality were merely descriptive of her status as a dual national (Pet. App. A 12a-16a; Pet. App. B 30a-33a).

The lower courts also held that even if decedent's conduct in 1944 resulted in her expatriation, her subsequent actions denying that she had ever taken an oath of allegiance to a foreign power, and taking advantage of her asserted United States citizenship, estopped her executor from now claiming that she was not a United States citizen (Pet. App. A 19a-22a; Pet. App. B 33a-34a). Finally, the court of appeals held that, in any

[2]The determination in this case of Mrs. Burns' citizenship will control the outcome of a related Tax Court proceeding involving her estate's liability for federal estate taxes in an amount exceeding $3,000,000. *Estate of Dorothy Gould Burns, deceased, William L. Matheson, Executor* v. *Commissioner*, Dkt. No. 8756-73. The proceedings in that case have been stayed pending the final decision in this case.

event, petitioner was barred by laches from raising a claim of expatriation that is now more than 30 years old, especially in light of the fact that the critical witness, the decedent, was no longer available to testify (Pet. App. A 23a-24a).

ARGUMENT

1. Section 401(a) and (b) of the Nationality Act of 1940, *supra*, p. 2, provides that "[a] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by" "[o]btaining naturalization in a foreign state * * * upon his own application * * *" or "[t]aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state."[3]

Petitioner argues that decedent's 1944 application for a certificate evidencing her Mexican nationality automatically expatriated her under the statute. But in *Afroyim* v. *Rusk*, 387 U.S. 253, this Court rejected an analogous contention in a case involving Section 401(e) of the Nationality Act, which then provided that a United States citizen would lose his citizenship by voting in a foreign political election. Afroyim was a naturalized American citizen who had voted in such an election, but in so doing, had no intention of renouncing voluntarily his United States citizenship (387 U.S. at 254-255). After observing that United States citizenship was conferred by the Fourteenth Amendment upon persons born or naturalized in the United States, the Court held that Section 401(e) was unconstitutional because Congress had no general power to take away an American citizen's citizenship without his assent. As the Court stated, "the Amendment can most

[3]Substantially identical provisions of current law are found in the Immigration and Nationality Act of 1952, 66 Stat. 267, Section 349(a)(1) and (2) (8 U.S.C. 1481(a)(1) and (2)).

reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it" (387 U.S. at 262).

Here, there is nothing in the record that would support a finding that decedent's application for a certificate of Mexican nationality was prompted by a specific intent to relinquish her American citizenship. Indeed, decedent had already become a Mexican citizen by operation of Mexican law upon her marriage to Archibald Burns. Thus, the court of appeals held that the evidence "not only fails to show that [decedent] intended expatriation but, on the contrary, overwhelmingly supports the inference that she sought and obtained dual nationality" (Pet. App. A 19a). Under these circumstances, the appellate court correctly decided that *Afroyim* governs this case and requires the conclusion that decedent was not expatriated by her application for a certificate of Mexican nationality.[4] At all events, even apart from *Afroyim*, decedent's application for a certificate evidencing her Mexican nationality was not expatriating conduct under the Act because of her status as a dual national. See *Jalbuena* v. *Dulles*, 254 F. 2d 379 (C.A. 3); *Kawakita* v. *United States*, 343 U.S. 717, 723-724.

Although petitioner attempts (Pet. 10) to distinguish *Afroyim* on the ground that it involved voting in a foreign political election, the rationale of the Court's

[4]Contrary to petitioner's argument (Pet. 10), *Afroyim* was not overruled by *Rogers* v. *Bellei*, 401 U.S. 815. That case involved a statutory grant of citizenship to persons born abroad of United States parents. The Court held that Congress could constitutionally impose reasonable conditions subsequent of residency which, if unfulfilled, would result in loss of that citizenship. In so holding, however, the Court distinguished *Afroyim* and emphasized (401 U.S. at 835) that its decision did not apply to the constitutional citizenship involved in that case.

decision cannot be confined to Section 401(e) of the Act. *Afroyim* broadly held that Congress has no power to prescribe any objective conduct that will automatically result in expatriation, absent the individual's voluntary relinquishment of citizenship (387 U.S. at 268). It is therefore equally applicable to this case involving the application by an American citizen for a certificate evidencing foreign nationality.

Indeed, in accord with the decision below, the lower courts have applied the *Afroyim* rationale to a variety of expatriating provisions of the statute. See, *e.g., Jolley* v. *Immigration and Naturalization Service*, 441 F.2d 1245 (C.A. 5) (failure to report for military induction not automatically expatriating); *Baker* v. *Rusk*, 296 F. Supp. 1244 (C.D. Cal.) (oath of allegiance to foreign power not automatically expatriating); *In re Balsamo*, 306 F. Supp. 1028 (N.D. Ill.) (return to country of origin not automatically expatriating); *Peter* v. *Secretary of State*, 347 F. Supp. 1035 (D. D.C.) (employment for foreign government not automatically expatriating).[5] The Attorney General has likewise expressed the opinion that *Afroyim* applies to all sections of the Nationality Act of 1940 involving expatriation. 42 Op. Att'y Gen., No. 34, pp. 4, 5 (1969). Thus, contrary to petitioner's assertion (Pet. 12), there is no uncertainty concerning the applicability of *Afroyim* that would require review by this Court.

Finally, *Savorgnan* v. *United States*, 338 U.S. 491 (Pet. 9), does not support petitioner's expatriation claim. There, the individual had executed a specific renunciation

---

[5]Even prior to *Afroyim*, this Court had invalidated other involuntary expatriation provisions. See *Trop* v. *Dulles*, 356 U.S. 86; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144; *Schneider* v. *Rusk*, 377 U.S. 163; *Nishikawa* v. *Dulles*, 356 U.S. 129.

of her United States citizenship as a condition to her naturalization as an Italian citizen, and that renunciation was knowing and voluntary (338 U.S. at 494-495, 502). On those facts, the Court held that she could not avoid the consequences of her act by showing her "undisclosed intent" not to lose her United States citizenship (*id.* at 500). *Savorgnan* is therefore entirely consistent with the holding of *Afroyim*, that Congress could not deprive an individual of his citizenship "without his assent" (387 U.S. at 257). In *Savorgnan*, that assent was conclusively established by the individual's explicit, knowing, and voluntary renunciation of her United States citizenship.

2. Even if decedent's application for a certificate of Mexican nationality was expatriating, the court of appeals correctly held that petitioner was estopped from making such a claim because decedent had repeatedly represented to the United States government that she was an American citizen and that she had never taken an oath of allegiance to any foreign state and had thereby secured substantial benefits from this government, such as a United States passport, United States registry of her vessel with certain collateral financial benefits, and French tax benefits premised upon her American nationality. *Rexach* v. *United States*, 390 F.2d 631 (C.A. 1), certiorari denied, 393 U.S. 833. See also *Commissioner* v. *National Lead Co.*, 230 F.2d 161, 165 (C.A. 2), affirmed on another issue, 352 U.S. 313.

Petitioner argues (Pet. 13, 15) that the expatriation claim is not barred because decedent's earlier conduct was based upon an innocent mistake of law and because the government did not rely on her conduct to its detriment. But decedent's representations included the specific declaration that she had not taken an oath of

allegiance to any foreign state (Pet. App. A 5a). Her conduct was therefore not prompted by an innocent mistake of law. Moreover, the United States extended to decedent numerous benefits that were only accorded citizens on the strength of these representations. Petitioner should not now be able to claim after decedent's death, for the purpose of avoiding taxes, that she was not an American citizen.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JONATHAN S. COHEN,
GEORGE G. WOLF,
Attorneys.

JULY 1976.

---

[6]The court of appeals also correctly held that petitioner's claim of expatriation is barred by laches because it is based upon events which occurred over 30 years ago and decedent is now unavailable to explain her conduct (Pet. App. A 23a-24a). See *Simons* v. *United States*, 452 F.2d 1110, 1116-1117 (C.A. 2). The equitable considerations against allowing such a claim when decedent had ample prior opportunities to advance it over a 20-year period and chose not to do so are the essence of the bar of laches.

DOJ-1976-07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1651

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM OF PETITIONER

JOHN S. MARTIN, JR.
MARTIN, OBERMAIER & MORVILLO
1290 Avenue of Americas
New York, New York 10019
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM OF PETITIONER

In an attempt to avoid the question whether *Afroyim* v. *Rusk,* 387 U.S. 253, still represents the views of a majority of this Court, the Government states that Mrs. Burns had become a citizen of Mexico by operation of law at the time of her marriage and, thus, was a dual national at the time she applied for a certificate of nationality. This claim is, however, directly contradicted by an official interpretation of the applicable Mexican laws by the Department of Foreign Affairs of Mexico rendered in response to an inquiry from our State Department in connection with this very case. In this memorandum the Mexican Government stated that Mexican law required a woman who married a Mexican national to make application for citizenship in which she renounced any other nationality. The Mexican Government noted in this memorandum that in 1936 Mexico promulgated as a domestic law the Convention of Na-

tionality signed in Montevideo in 1933, which expressly provided that neither matrimony nor its dissolution should affect the nationality of the wife and which provided further that naturalization in Mexico should carry with it the loss of nationality of origin.

Thus, this is not a case of a dual national who simply performs an action consistent with that status. Compare, *Kawukita* v. *United States,* 343 U.S. 717, 723-724; *Jalbuena* v. *Dulles,* 254 F.2d 379 (C.A. 3). In this case Mrs. Burns did not become a Mexican citizen until she filed an application for a certificate of nationality in which she renounced her citizenship of origin. When she performed that act, she lost her United States citizenship under the express terms of the Nationality Act of 1940 and the principles enunciated by this Court in *Savorgnan* v. *United States,* 338 U.S. 491.

The decision below can, therefore, be sustained only on the basis that *Afroyim* v. *Rusk, supra,* overruled *Savorgnan* v. *United States* and that under *Afroyim,* the provisions of the Nationality Act of 1940 at issue here are unconstitutional. As we noted in our main brief the question of the continuing validity of *Afroyim* and the constitutionality of the provision of the Nationality Act at issue here are important questions which merit review by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
MARTIN, OBERMAIER & MORVILLO
1290 Avenue of the Americas
New York, New York 10019
Attorneys for Petitioner